

SEP 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HUMBERTO DIAZ-VALDEZ,

Defendant - Appellant.

No. 06-30147

D.C. No. CR-05-00128-WFN

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior Judge, Presiding

Submitted September 11, 2006^{**}

Before: PREGERSON, T. G. NELSON, and GRABER, Circuit Judges

Humberto Diaz-Valdez appeals the sentence imposed following his guilty plea to being found in the United States after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Diaz-Valdez contends that the district court erred in sentencing him pursuant to 8 U.S.C. § 1326(b)(2) to more than the two-year maximum set forth in § 1326(a) on the basis of the finding that he had a prior felony conviction that preceded his deportation when those facts were not charged in the indictment, admitted, or proved to a jury. He argues that the doctrine of constitutional avoidance requires that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), be limited to the holding that the maximum penalty may be increased on the basis of a judicial finding regarding the fact of a prior conviction, and not be extended to allow judicial findings regarding facts about a prior conviction. This contention is foreclosed. *See United States v. Castillo-Rivera*, 244 F.3d 1020, 1025 (9th Cir. 2001).

Diaz-Valdez also contends that intervening Supreme Court decisions have overruled *Almendarez-Torres* and this court's decisions interpreting *Almendarez-Torres* to allow sentence increases upon a judicial finding of the fact of a prior conviction. As he recognizes, this contention also is foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

AFFIRMED.